IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No.: 15-14786

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

DENNIS WILKERSON,
Defendant-Appellant.

A DIRECT APPEAL OF A CRIMINAL CASE FROM THE
UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA
6:14-CR-00267-RBD-KRS-1

INITIAL BRIEF ON BEHALF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules Appellate Procedure, Appellant submits that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Dennis Wilkerson (Defendant-Appellant)

Mark K. McCulloch, Esq. (Attorney for Appellant)

Jaime T. Halscott, Esq. (Sentencing Attorney for Appellant)

Appeals Law Group (Law firm retained by Plaintiff)

United States of America (Appellee)

Ilianys Rivera Miranda, Esq (Attorney for Appellee)

Nicole M. Andrejko, Esq. (Attorney for Appellee)

Hon. Roy B Dalton, Jr. (U.S. District Judge)

Hon. Karla Spaulding (U.S. Magistrate Judge)

Amir A. Ladan, Esq. (Former Attorney for Appellant)

D. Todd Doss, Esq. (Former Attorney for Appellant)

Maria Guzman, Esq. (Former Attorney for Appellant)

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a), Appellant Dennis Wilkerson respectfully requests oral argument. Traveling to meet a minor is not a substantial step under §2422(b) because the statute punishes attempting to persuade a minor to engage in illegal sexual activity using the internet and NOT attempting to engage in illegal sexual activity with a minor. In fact, traveling is irrelevant to whether Appellant persuaded a minor to have sex through use of the internet. *See United States v. Rothenberg*, 610 F.3d 621, 627 (11th Cir. 2010) (§2422(b) "contemplates oral or written communications as the principal if not the exclusive means of committing the offense"). This distinction has eluded some courts, including the trial court below. Oral argument will aid this Court in drawing this distinction by distinguishing the facts in this case from other cases (*see* e.g., *Murrell, Lee, Yost, Root*).

Further, it is respectfully suggested oral argument would aid this Court in resolving the mistaken application in the trial court of a two-level and a five-level sentencing enhancement where the trial court incorrectly interpreted the guideline application under this set of facts. It is suggested this Court will benefit from the presence of counsel before the Court to comment upon the legal issues and respond to inquiries from the Court.

JURISDICTIONAL STATEMENT

This appeal is made by right pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. Final Judgment and Sentence were entered October 15, 2015. *See* Dckt. 122. A timely notice of appeal was filed on October 26, 2015. *See* Dckt. 125.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the evidence was insufficient to sustain Appellant's conviction under 18 U.S.C. §2422(b) where there were no communications that established Appellant's intent to entice a fictitious minor, either directly or indirectly through an adult intermediary, using a means of interstate commerce.

2. Whether the evidence was insufficient to sustain Appellant's conviction where attempted online enticement under 18 U.S.C. §2422(b) requires a substantial step toward causing a minor's assent to engage in sexual activity using interstate communications and where Appellant took no such substantial step.

3. Whether the Trial Court erred by applying a two-level and a five-level sentencing enhancement under U.S. Sentencing Guidelines Manual §3D1.4 and 4B1.5(b) where there was insufficient evidence to sustain a conviction on Count One or that Appellant "engaged in a pattern of activity involving prohibited sexual conduct" and where the offense for which Appellant was convicted is not a covered offense under the enhancement and therefore is inapplicable.

STATEMENT OF THE CASE

Appellant was indicted by a federal Grand Jury on November 25, 2014, and charged with attempt to persuade, induce, and entice a person believed by the defendant to be younger than 18 years old, through an adult intermediary, to engage in sexual activity, in violation of 18 U.S.C. § 2422(b), based upon communications alleged to have taken place between October 22, 2014, and October 27, 2014 (Count One). *See* Dckt. 12. There was a criminal forfeiture associated with the charges, pursuant to 18 U.S.C. § 2428. *Id.*, at 2-3. Appellant pleaded not guilty at arraignment December 4, 2014. *See* Dckt. 19. Appellant previously, was detained pending trial following his first appearance October 28, 2014, upon his arrest. *See* Dckt. 2.

The Government filed a Superseding Indictment on January 28, 2015, adding a second count of attempt to persuade, induce, and entice a person believed by the defendant to be younger than 18 years old, through an adult intermediary, to engage in sexual activity, in violation of 18 U.S.C. § 2422(b), based upon communications between July 14, 2014, and July 16, 2014 (Superseding Count One). The original Count One in the indictment was re-cast as Superseding Indictment Count Two. *See* Dckt. 30.

Trial before a jury was held from April 13, 2015, through April 15, 2015. See Dckt. 138, 138, 140. The jury found Appellant guilty on both counts on April 15, 2015. *See* Dckt. 80. Appellant appeared for sentencing on October 14, 2015. *See*

Dckt. 141 at 2. Appellant was sentenced to a term of 210 months in custody followed by eight (8) years of supervised release on each count, the sentences running concurrently. *Id.*, at 60; *see also* Dckt. 122. The Trial Court waived the imposition of a fine. *Id.*, at 64.

Appellant timely filed a notice of appeal on October 26, 2015. *See* Dckt. 125. This appeal follows.

STATEMENT OF FACTS

I. Introduction

Mr. Wilkerson responded to two online solicitations from an undercover Government agent posing as the father of a twelve-year-old daughter he was pimping out online. Mr. Wilkerson never communicated directly or indirectly with the fictitious minor and his communications with the fake father were limited to negotiating a price for oral sex from the fictitious minor.

Mr. Wilkerson first responded to the fake father's solicitation to pimp out his fictitious daughter on July 14, 2014. The conversation focuses on agreeing to a price for oral sex but no deal is ever reached and no meeting ever takes place. All communication ceased on July 18, 2014.

The same fake father posted a second solicitation on October 22, 2014, again, pimping out his fictitious daughter. Mr. Wilkerson responded to the online solicitation again, seeking to negotiate a price for oral sex. The initial conversation

ends abruptly and five days later, Mr. Wilkerson emails the fake father asking if he and his fictitious daughter are still in town. The conversation immediately returns to nothing more than negotiating a price for oral sex and then to the details about meeting to facilitate the introduction of Mr. Wilkerson to the fictitious daughter.

When Mr. Wilkerson traveled to the original meeting place, he hesitated and inquired of the fake father if he was a cop or working with police and the fake father lied and said no. Mr. Wilkerson suggests an alternative meeting place and when he arrives there, he drove through the parking lot but never stopped and never engaged the fake father in any conversation. He was arrested as he was leaving the parking lot.

II. The Government's Case-in-Chief

SPECIAL AGENT JOHN McELYEA has been a member of the FBI's Violent Crimes Against Children, Innocent Images Task Force since 2005. *See* Dckt. 139 at 38. As part of the Task Force, he investigates individuals who are perpetrating or trying to perpetrate crimes against children online, including child pornography and soliciting and traveling to meet minors for sex. *Id.* He also investigates individuals who attempt to meet children online to entice or persuade them to engage in sexual activity and then attempt to travel to meet that individual. *Id.*, at 39.

Special Agent McElyea said online investigations basically involves an officer going online to areas where individuals may be seeking to solicit children.

See Dckt. 139 at 40. Officers pose as underage children in some of the sites or will take on the role of a "bad dad" where a father offers his daughter for prostitution. *Id.* Special Agent McElyea noted that Craigslist is a legitimate advertising website however, within a section called "casual encounters," people seek out sex of all kinds. *Id.*, at 42. "It's just almost like a Wild West on craigslist where people search for sex." *Id.*, at 44. He said Craigslist is known for being a place where people go to seek out children to engage in sexual activity. *Id.*, at 41.

In the instant case, Agent McElyea said on July 14, 2014, he posted an advertisement titled, "Dad and daughter, Altamonte Springs, MW4M." *See* Dckt. 138 at 44. There was no mention of age because the website will not allow advertisements involving a child and if it happens, the ads will be flagged or removed from the site. *Id.*, at 45; 70. Special Agent McElyea also admitted the ad he placed was flagged but that he was unsure who had flagged it to Craigslist. *Id.*, at 101.

Special Agent McElyea said he received approximately 30 to 35 responses to the ad including a response from someone he later identified as Appellant. *Id.*, at 46. Special Agent McElyea said Appellant responded, "I'm interested in finding out more about what you're offering. I'm 35 YO MWM." *Id.*, at 50. Special Agent McElyea said he began communicating with Appellant via Gmail and responded, "Dude just to let you know, I'm 50. Not into dudes. My daughter, 12, she's into

dudes. We're both into roses." *Id.*, at 51. There was no actual minor involved. *Id.*, at 101.

Special Agent McElyea said the reason he responded as he did was to "put an act of prostitution out there" but also to let the person to whom he was responding know three things: he was not interested in participating in any sex, his daughter was 12 years old and that "we" planned on getting paid. *See* Dckt. 139 at 51. According to Special Agent McElyea, Appellant responded by saying the 12-year-old "daughter" was "way too young." *Id.; see also* Dckt. 139 at 103. Special Agent McElyea responded, "Dude, that's cool. All is consensual, nothing is forced." *Id.*, at 52.

Special Agent McElyea said the purpose of his response was to "give him an out" and that if he was not interested there would be no hard feelings. *See* Dckt. 139 at 52. He said he did not want to arrest someone not interested in engaging in sexual activity with a minor. *Id.* He said in response, Appellant asked for a picture to which Special Agent McElyea declines and repeats that his "daughter" was 12 years old. *Id.*, at 53. He said Appellant then asked for a physical description before the conversation turned to discussing a price. *Id.*, at 54.

The "roses," Special Agent McElyea responded, "are dependent on what you want." *See* Dckt. 139 at 55. The price, Special Agent McElyea responded, was $50 for oral sex. *Id.* He said Appellant said that was too much and suggested $30 to

which Special Agent McElyea indicated $30 "wouldn't get it done." *Id.*, at 55-56. Appellant responded that he had $40 with him and could be in Altamonte Springs (the location indicated in the original ad) in twenty minutes. *Id.*, at 57.

The conversation continued between Special Agent McElyea and Appellant as the two continued to negotiate a price. Special Agent McElyea said $40 "could be doable" and a location to meet is requested. *See* Dckt. 139 at 58. Special Agent McElyea said he already had another investigation ongoing where he was going to prostitute his "daughter" and earn $100 so he had to "prioritize." *Id.*, at 59. Appellant in response suggested meeting for $40 for this time and proposing to offer $50 the next day. *Id.*, at 60. Ultimately no meeting was arranged and no price agreed to but Special Agent McElyea told Appellant to contact him the next day if he was still interested. *Id.*

The following day, July 15, 2014, Special Agent McElyea, posing as the fake "father," contacted Appellant and told him he and his daughter were "back from Buena Vista" and had "stayed the night at a hotel." *See* Dckt. 139 at 61-62. Appellant said he was "free to meet" if available. *Id.*, at 61. Special Agent McElyea responded by noting "that's a good possibility" and restated that Appellant could receive oral sex for $40 and that if he wanted "more" they could negotiate a "better price." *Id.* No meeting was agreed to.

The following day, on July 16, 2014, Appellant contacted the fake "father" and explained he had gotten "caught up with work" but that he was available and asked if the fake "father" and "daughter" were "still in town." *See* Dckt. 139 at 63. Special Agent McElyea responded he was and asked "what would you be down for" trying to "clarify his intentions." *Id.* Appellant responded he was likely only interested in oral sex but that it "depends on the roses" meaning the price. *Id.* In response, Special Agent McElyea suggested that for $75, Appellant could get "more" to which Appellant responded, "sounds good" and asked for an address. *Id.*

Special Agent McElyea did not respond. *See* Dckt. 139 at 63. Appellant then attempts to determine if there is an agreement and when Special Agent McElyea fails to respond, Appellant abandons the conversation. "Then I guess this isn't going to happen. Oh, well, I tried." *Id.*, at 64. Two days later, July 18, 2014, Special Agent McElyea attempts to salvage the situation by suggesting "my daughter and I got an offer we couldn't refuse" and were down at Buena Vista (Disney) where they were "wined and dined." *Id.*, at 64. He reached out to Appellant and said if Appellant was still interested he should contact the fake "father." *Id.*, at 65. There was no further communication and no agreement was ever reached. *Id.*

On October 22, 2014, Special Agent McElyea, as part of Task Force activity, posted another Craigslist advertisement, similar to the one he posted back in July, but this time, he changed the advertisement slightly by noting that, acting again as a

"bad dad," he was located in Kissimmee, Florida, in Osceola County. See Dckt. 139 at 65. The advertisement read, "dad and daughter looking to make some roses. No task is too big. Just ask and we'll let you know if we can comply." Id., at 67-68. As he had previously, Special Agent McElyea said he received 30 to 35 responses to the ad, which did not include any reference to age. Id., at 68.

Agent McElyea said Appellant was one of those answering the ad and responded, "how about a BJ?" *See* Dckt. 139 at 70. Agent McElyea, posing as the fake "dad" of his fake "daughter," responded, "I'm a 50-year-old dad. My daugh is 12. She's into dudes. I'm not. The roses are dependent on what you wanna do." *Id.*, at 71-72. Appellant responded, "I'm just looking for a BJ. Where are you staying?" *Id.*, at 72. Special Agent McElyea, posing as the fake "dad," responded, "dude, that would be 50 roses, the roses up front, we're in Kissimmee." *Id.* Appellant responded that he agreed and asked if the fake "dad" was available to meet following day. *Id.*

During a follow-up conversation, Special Agent McElyea, posing as the fake "dad," asked Appellant if he had ever received oral sex from a 12-year-old, saying the purpose of the question was to "make sure the defendant was still interested." *See* Dckt. 139, at 73. Special Agent McElyea, posing as the fake "dad," asks Appellant if the $50 for oral sex is acceptable but receives no response. *Id.*, at 75. There was no further communication until October 27, 2014, when Appellant asked the fake "dad" if he was "still in town." *Id.*

Special Agent McElyea, posing as the fake "dad," responded and Appellant then explained, "couldn't meet last week but free today." *See* Dckt. 139 at 76. Special Agent McElyea repeated the offer of "50 roses for a BJ from my daughter" and Appellant answered, "exactly." *Id.* The conversation then moved to discussing a location to meet. *Id.* After saying his fake "daughter" was in school, the fake "dad" said he could pull her out of school early "for a doctor's appointment – wink, wink, hint hint." *Id.*, at 77.

Appellant said the fake "dad" should not do that and continued to discuss a potential time and location to meet. *See* Dckt. 139 at 79. Special Agent McElyea suggested the rest area on Interstate 4 in Longwood, to which the Appellant agrees. *Id.* Special Agent McElyea then repeats the terms and Appellant agrees "just a BJ and donation up front. Can you do $40?" *Id.*, at 80. Appellant was trying to renegotiate the price. *Id.*, at 81.

Special Agent McElyea responded, "Dude, dude, dude. You're killing me! What do you have worth $10 plus a $40 donation?" *See* Dckt. 139 at 81. Appellant stated the $40 was easier because of the way the ATM machine dispenses cash. *Id.* Special Agent McElyea then gives a description of the vehicle in which he, the fake "dad" would be in and the details about where in the rest area to expect to find him. *Id.*, at 82. He said once the meeting was set up, he briefed the "take down team." Id.

Special Agent McElyea identified the fake "dad" as "Bob" but Appellant did not provide any description. *See* Dckt. 139 at 83. Appellant then contacted "Bob" and said he was running late and then changed the time for the meeting. *Id.*, "Bob" said he would be in a red Pontiac G6. Appellant then asked, "How do I know you aren't with law enforcement? This is sketchy shit." *Id.*, at 84. "Bob" answers, "no shit. We're cool. We're not fucking cops. That's why we aren't meeting at the house," and then asked if Appellant was a cop and, because Appellant had not arrived at the meeting location yet, if he should stay or leave. *Id.*

Appellant said he was not a cop but was "just being safe" and then changed the meeting location from the rest area to the parking lot of the Gander Mountain store located in Lake Mary, a short distance from the rest area. *See* Dckt. 139 at 85. Special Agent McElyea agreed to change the location and Appellant told him he was driving a black Ford Fusion. *Id.* Special Agent McElyea said he noticed a black Ford Fusion while waiting at the rest area before the team left and proceeded to the new meeting location. *Id.*, at 87. No contact was ever made and Appellant never reached out to "Bob" via email or text. *Id.*, at 111.

Appellant arrived in the Gander Mountain parking lot before police arrived. See Dckt. 139 at 111. Appellant never parked directly next to the undercover vehicle. Id. Appellant then pulled out and appeared to drive by "window to window" with the undercover car. *See* Dckt. 139 at 88. Appellant never stopped and as soon as the

car pulled past the undercover car, Special Agent McElyea said the take down team went into action and stopped Appellant. *Id.*, at 88. He said there was no pursuit and when the police activated their lights, Appellant stopped. *Id.*; *see also* Dckt. 139 at 113. Appellant was ordered from his vehicle at gun point and pressed to his knees. *Id.*, at 89.

Special Agent McElyea said after being pulled from his car, Appellant spontaneously said, "I've just ruined my life. This is stupid. I have kids." *See* Dckt. 139 at 89. Appellant was placed under arrest and while being searched, police found $53 in cash, two ATM receipts, and an iPhone. *Id.* There was no videotape of the take down and no audio recording of any statements Appellant made spontaneously after his arrest. *Id.*, at 115.

SPECIAL AGENT RODNEY HYRE works for the Federal Bureau of Investigation and has been the coordinator of the Violent Crimes Against Children, Innocent Images Task Force, for six years. *See* Dckt. 139 at 121. Specifically, he has had training with the FBI's Behavioral Analysis Unit to "understand the mind of child predators and how to conduct interviews with child predators." *Id.*, at 122. He said the targets are people who have expressed an interest in having sex with a child and "if they are serious about that and if they are actually going to do it" and "have taken serious steps to make that happen," agents try to identify them and take them into custody. *Id.*, at 123.

Special Agent Hyre's involvement in the instant case began on October 27, 2014. *See* Dckt. 139 at 123. Once Special Agent McElyea indicated Appellant "actually wanted to meet and engage the 12-year-old in sex," an operations plan was developed to meet him and affect an arrest. *Id.* He said Appellant was arrested at approximately 4:05 p.m. in the Gander Mountain parking lot in Lake Mary. *Id.*, at 124. Special Agent Hyre was the first to make contact with Appellant and it was to Special Agent Hyre that Appellant made the spontaneous statements. *Id.*, at 125.

He said once Appellant made the statement, Special Agent Hyre "jumped in to stop him because I realized he was confessing and I had not advised him of his Miranda rights yet." *See* Dckt. 139 at 127. He then advised Appellant of his rights and that Appellant appeared "excited" but otherwise clear-headed and agreed to continue to speak with detectives. *Id.*, at 128. Special Agent Hyre said he took Appellant's iPhone from his hand and asked if he "had been talking to a father about having sex with that father's 12-year-old daughter with that iPhone." *Id.*, at 129.

Appellant told Agent Hyre he was talking to a father of a 12-year-old for approximately five days about setting up the meeting so that he could receive oral sex from the man's daughter. *See* Dckt. 139 at 129. All of the communication, Appellant told Special Agent Hyre, was using the iPhone through email. *Id.*, at 130-131. Appellant said he understood that the daughter was 12 years old and admitted the money found in his pocket was to pay for the oral sex. *Id.*, at 131.

Appellant admitted to Special Agent Hyre he had used Craigslist several times in the past and the last time was approximately two months prior to meet both men and women on Craigslist for the purpose of engaging those people in sex, including speaking to a different father about that person's 12-year-old daughter. *See* Dckt. 139 at 132-133; 136. Appellant said the reason he came to meet a 12-year-old for oral sex when he knew he could go to prison was "maybe it was the thrill of having sex with a 12-year-old" or "maybe it was the thrill of going to jail." *Id.*, at 133. Special Agent Hyre said Appellant gave consent to search Appellant's email account, his iPad, his iPhone, his laptop and his car. *Id.*, at 134.

AGENT DEBRA HEALY, an investigator with the Seminole County Sheriff's Office for fourteen (14) years, was assigned to the Violent Crimes Against Children, Innocent Images Task Force as a forensics examination. *See* Dckt. 139 at 191. She has been with the task force since 2009 and is an expert in digital forensics. *Id.*, at 194. She was responsible for conducting an analysis on Appellant's Apple iPhone that was turned over to her from Special Agent Hyre when Appellant was arrested. *Id.*

Essentially, the iPhone is taken to the forensics laboratory where it is catalogued, its model number documented, and then its data extracted using a forensic program called Cellebrite. *See* Dckt. 139 at 197. Cellebrite is a universal forensic extraction tool which is a combination of both hardware and software. *Id.*

It is the "industry standard for cell phone forensics," according to Agent Healy. *Id.*, at 198. The program does not alter or modify any of the information on the device when it is being examined. *Id.*, at 199.

Appellant provided a written authorization to search the iPhone and to search his email account. *See* Dckt. 139 at 197-198. Immediately after being given the phone, Agent Healy said she placed it into "airplane mode" to prevent any of the data from being altered from that point forward. *Id.*, at 199. Once the examination is complete, certain reports are generated and then the reports are analyzed for "anything considered evidentiary based upon information the investigators give me about the case." *Id.*, at 200. She said the report generated in the instant case was more than 12,000 pages. *Id.*

Agent Healy performed several "key word" searches of the data and then "documented certain things or bookmarked certain things" and it was those items that were then exported into a final report given the authorities. *See* Dckt. 139 at 200. Agent Healy said based upon her examination, and using a keyword search for "dad and daughter," the two separate email communication chains given to her by Special Agent McElyea were consistent with the emails discovered on Appellant's phone. *Id.*, at 201.

Following Agent Healy's testimony, the Government rested its case. *See* Dckt. 139 at 209.

III. DEFENSE MOVES FOR JUDGMENT OF ACQUITTAL

Upon the Government resting its case-in-chief, the Defense moved for a Judgment of Acquittal, specifically incorporating the arguments made in the Defense motion, pre-trial, to dismiss the case. *See* Dckt. 139 at 215. Trial Counsel made three specific arguments in support of its motion for acquittal: (1) the Government failed to put forth evidence Appellant "did utilize a means or facility of interstate commerce" (*see* Dckt. 139 at 210); (2) the evidence failed to establish that there was "a knowing attempt to persuade, induce, or entice someone Appellant believed to be a minor to engage in sexual activity which could be charged as a criminal offense in the State of Florida" (*see* Dckt. 139 at 212); (3) there was insufficient evidence to prove an attempt to persuade, entice, or induce on the part of Appellant (*see* Dckt. 139 at 213).

A. Lack of Jurisdiction

Trial Counsel argued the sole tie to federal jurisdiction was Appellant's use of his cell phone and as a result, "if every time somebody used a cell phone we could create a federal crime out of it, then jurisdictional boundaries between federal and state court would be obliterated." *See* Dckt. 139 at 211. Government incorporated its response in opposition to the motion to dismiss. *Id.*, at 217. The Trial Court denied the pre-trial motion to dismiss but offered no response in its oral pronouncement denying the motion for acquittal.

Trial Counsel analogized that if the instant case was a drug case, where a cell phone is used to call to buy or sell drugs, that use, in and of itself, would not trigger federal jurisdiction and would require something more. *See* Dckt. 139 at 211. Recognizing the factual difference at issue, Trial Counsel nonetheless argued the analogy remains the same particularly in the "digital era that we live in." He argued the cell phone use was contained specifically within one state "and in this particular case within a tri-county area" and thus did not give rise to a federal issue. *Id.*

B. No evidence of violation of Florida Statute

Trial Counsel argued there was no testimony about what the crime in Florida would be if, in fact, it had been committed, no testimony about any statutory basis, and "no description of any kind from any witness before the court that would suggest that we have established for the jury's consideration that had this charade been allowed to continue forward and had a potential meeting actually occurred, that somehow a violation of Florida Statute would have thereby been perpetrated." *See* Dckt. 139 at 213.

The Government argued that had Appellant received oral sex from a minor it would have been unlawful under Fla. Stat. 800.04.[1] *See* Dckt. 139 at 219. The

[1] A person commits lewd or lascivious battery by engaging in sexual activity with a person 12 years of age or older but less than 16 years of age. *See* Fla. Stat. 800.04(a)(1). "Sexual activity" means the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another

Government suggested this was contained within the jury instructions. *Id.* The Trial Court specifically asked what evidence in the record existed that the offense described violated Florida law to which the Government answered it had presented no evidence in the record but rather it was for the Court to instruct that oral sex is considered "sexual activity" that is unlawful under Florida law.[2] *Id.*, at 221.

"It basically sounds like you are arguing that I can take judicial notice of the fact that this offense is a violation of Florida law," the Trial Court queried. *See* Dckt. 139 at 220. Ultimately, the Trial Court ruled the Government was not obligated to present evidence on this point and that the Court could take judicial notice, despite the fact there was no formal request to do so and typically, a request to take judicial notice is made through a stipulation by the parties, also absent in the instant case. *Id.*, at 222.

C. Lack of Evidence of Attempt to Persuade, Induce, or Entice

Trial Counsel argued the solicitation was made by the Government when Special Agent McElyea posted the advertisement on Craigslist. *See* Dckt. 139 at 214. He said the advertisement is "*per se*" a solicitation and is not "an invitation to be solicited." *Id.* "To suggest that someone responding to an advertisement is thereby

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by any other object; however sexual activity does not include an act done for a bona fide medical purpose. *See* Fla Stat. 800.04 (1)(a).

[2] The Government argued its agents could not testify to this fact because it called for a legal conclusion which is improper for a lay witness. *See* Dckt. 139 at 222.

inducing the salesperson by offering to purchase what is being offered is absurd." *Id.* Importantly, Trial Counsel argued, to accept that position is contrary to the common definition of the words and would require redefining them. *Id.*

Trial Counsel argued it was the Government that responded to Appellant's initial response to the advertisement with a price for oral sex and that the suggestion of price did not come from the Appellant. *See* Dckt. 139 at 214. Further, Appellant did not increase the price "as a means of inducing, enticing, or persuading the fake "dad" or fake "daughter" to "do something more than had already been previously been offered without his involvement." *Id.* Finally, Trial Counsel argued there was no evidence of any gifts or promises or requests made to do anything more than what was already offered by the Government. *Id.*

The Government argued this case "falls squarely within the Eleventh Circuit definition of inducement." *See* Dckt. 139 at 217. According to the Government, when Appellant engaged in communications with the fake "dad" to set up a meeting and arrange a price to receive oral sex from the fake "daughter" Appellant was "actually inducing, stimulating the occurrence, of that meeting." *Id.*

The Government argued the evidence presented showed that when a meeting could not be arranged initially, Appellant offered more money to get the fake "dad" to agree to a meeting. *Id.*, at 218. More than inducement, the Government argued, the actions Appellant took actually "goes into persuasion and the enticement." *Id.*

Finally, the Government argued case law does not require Appellant to directly communicate with a minor in order to be found guilty under the statute. *Id.*

D. Motion is Denied

The Trial Court denied the motion. *See* Dckt. 139 at 122. The Trial Court reasoned that Appellant's argument about a lack of persuasion, inducement, or enticement was foreclosed by Eleventh Circuit case law. *Id.* Appellant did not testify and the Defense presented no evidence before resting its case. *See* Dckt. 139 at 224; 227.

SUMMARY OF ARGUMENT

The Trial Court erred when it denied Appellant's motion for judgment of acquittal. The Government's evidence does not demonstrate the requisite intent under 2422(b). There is no evidence that Mr. Wilkerson sought through his communications to criminally persuade a minor, through an adult intermediary using a means of interstate commerce.

The Government's chief witness, Agent McElyea, said Mr. Wilkerson, during the communications, never asked the fake father whether the fictitious daughter had any special interests, made no requests to pass along any messages, never submitted sexually explicit photographs he wanted the adult intermediary to share with the fictitious minor and never engaged in any communication that could be considered

grooming behavior. Under these facts, the evidence is insufficient to prove the required intent.

Here, the Government's evidence failed to prove Appellant took a substantial step, required under §2422(b), to entice the fictitious daughter through the fake father, using a facility or means of interstate commerce. Under the law of attempt, the defendant's substantial step must be "necessary to the consummation of the crime." Appellant's physical travel to Lake Mary was not "necessary to the consummation of an offense" under §2422(b) and therefore cannot constitute a substantial step in the crime under the law of attempt. Section 2422(b) criminalizes certain communications between an adult and a minor or between an adult and an adult intermediary that attempts to transform the minor into his victim. Here, the evidence was insufficient to prove a substantial step.

As a matter of law, the Government's evidence failed to establish there was "a knowing attempt to persuade, induce, or entice someone Appellant believed to be a minor to engage in sexual activity which could be charged as a criminal offense in the State of Florida." Soliciting an adult to commit lewd or lascivious conduct is not illegal under Fla. Stat. 800.04. It is a crime only if the defendant actually committed, versus attempted to commit, lewd or lascivious conduct. No actual contact ever took place so as a matter of Florida law, Appellant could not be convicted under Fla. Stat. 800.04.

Appellant's sentence was enhanced incorrectly two levels based upon a multi-count enhancement and five levels pursuant to USSG § 4B1.5. In both instances, the Trial Court abused its discretion in overruling Appellant's objection at sentencing to these enhancements. The Government conceded there was no "victim" and the Government's chief witness at trial testified he was posing as the same fake father trying to pimp out his same fictitious daughter when he posted both solicitations on Craigslist. There was no evidence these were separate minors. As a result, the multi-victim enhancement was inapplicable and the Trial Court abused its discretion when it imposed it.

Further, because the evidence as to Count One of the Superseding Indictment was insufficient to sustain a conviction, and the July conversations were the basis for establishing a pattern of behavior, the five-level enhancement was improperly applied.

ARGUMENT

I. INTRODUCTION

Section 2422(b), 18 United States Code, states as follows:

> Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

The Statute also criminalizes "attempt to do so." Thus, to sustain a conviction for violating §2422(b) under its attempt clause, the government must prove Appellant: (1) "had the specific intent or mens rea to commit the underlying charged crime, and (2) took actions that constituted a "substantial step toward the commission of the crime." *See United States v. Lee, 603 F.3d 904, 914 (11th Cir. 2010); United States v. Yost*, 479 F.3d 815, 819 (11th Cir. 2007); *Braxton v. United States*, 500 U.S. 344, 349 (1991) (stating that "[f]or Braxton to be guilty of an attempted killing under 18 U.S.C. §1114, he must have taken a substantial step towards that crime, and must also have had the requisite mens rea"); *United States v. Monholland*, 607 F.2d 1311, 1318 (10th Cir. 1979) ("the cases universally hold that mere intention to commit a specified crime does not amount to an attempt. It is essential that the defendant, with the intent of committing the particular crime, do some overt act adapted to, approximating, and which in the ordinary and likely course of things will result in the commission of the particular crime."); *United States v. Bailey*, 228 F.3d 637, 640 (6th Cir. 2000) (The defendant's alleged substantial step towards the commission of the offense "must be necessary to the consummation of the crime and be of such a nature that the reasonable observer, viewing it in context could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to violate the statute.")

The facts in the instant case are distinguishable from other cases this Circuit has previously considered. Each of the significant cases to address the issue of the necessary proof to sustain a conviction under 18 U.S.C. § 2422(b) required the Government to prove two elements: (1) the defendant had a specific intent to use a means of interstate commerce to induce a minor to engage in sexual activity and (2) that the defendant took a substantial step toward the commission of the crime. While this Circuit has stated that a defendant does not have to communicate directly with the minor child, which recognizes the well-worn use by law enforcement of an undercover officer posing as a minor or as an adult eager to prostitute a minor child for a price, what is clear is that the adult intermediary must be used as a vehicle through which a defendant attempted to obtain the child's assent through persuasive communication directed toward the minor.

In *United States v. Murrell*, 368 F.3d 1283 (11th Cir. 2004), this Circuit first examined the question of whether a defendant who arranges to have sex with a minor through communications with an adult intermediary violates 2422(b). In *Murrell*, the defendant, who accepted plea in his case, entered a "family love" chat room on AOL and engaged in conversations with the purported mother of a thirteen-year-old daughter and engaged in specific conversations about the "discreet sexual relationship" he desired. Murrell had also, on a separate occasion, entered another AOL chat room entitled, "Rent F Vry Yng." In that conversation, there were

extended conversations that included recommendations for how an encounter would happen.

Murrell argued he never communicated directly with either minor child and thus could not be convicted of a 2422(b) offense based upon the plain language of the statute. This Court stated it was unnecessary to communicate directly with a minor, relying on its prior holding in *United States v. Root*, 296 F.3d 1222 (11th Cir. 2002). Of critical importance was the *Murrell* court's self-chosen definition of "induce" to mean to "stimulate or to cause the occurrence of." Under this definition, the *Murrell* court ruled simply negotiating with an adult intermediary was enough to prove Murrell was attempting to cause the minor to engage in sexual activity. Reliance upon *Murrell* by the Trial Court in the instant case, upon the facts, was misplaced.

In *United States v. Lee*, 603 F.3d 904 (11th Cir. 2010), this Circuit revisited the issue first presented in *Murrell*. In Lee, this Circuit held that the focus of the analysis about whether a 2422(b) violation took place is on the actions the defendant takes in trying to use the adult intermediary to convince the two minor girls to engage in sexual activity.

In *Lee*, the defendant spent considerable time and effort which was directed at the mother of two fictitious teenage girls whose online profile noted her interests in "Young Girls and Older Men Loving Each Other" and "Family Love is Best" (a

euphemism for incest). Lee repeatedly made references to the fake mother about his desire to "teach the girls" and his desire to "help a young lady become a woman." He also sent explicit photos to the fake mother with instructions to show the young girls and asked repeatedly for photographs of the young girls in sexually explicit poses. The conversations went on for months.

Under the facts of that case, this Circuit held there was sufficient evidence to convict Lee because the conversations went beyond mere preparation. Lee's actions constituted grooming behavior. Over the course of several months, the Court ruled, he repeatedly discussed in graphic detail when and how he wanted to have sex with the minors. In this case, Mr. Wilkerson never engaged in conduct even remotely close to Lee's extensive, graphic and direct communications.

In *United States v. Lanzon*, 639 F.3d 1293 (11th Cir. 2011), the conversations Lanzon engaged in included discussing what he wanted the fictitious minor to wear and what sexual techniques would "make her happy." He also inquired about what kind of candy the minor liked. This Court determined that actually engaging in a sex act was not required to support a conviction because the focus is on the attempt rather than the sex act itself. The focus is on the content of the conversations and not the intent to actually engage in a sex act with the fake minor.

In *United States v. Rothenberg*, 610 F.3d 621 (11th Cir. 2010), Rothenberg and a fake father, who already was having sex with his fake daughter, engaged in

illicit sexual discussions in a chat room about Rothenberg joining the father-daughter sexual relationship. Rothenberg traveled to meet and once there, continued to engage in the illicit sexual conversations. This Court ruled that what amounts to a substantial step toward the commission of a crime is a fact question that will vary from case to case. Critically, the focus is not on the act itself but rather on the communications to determine if a substantial step was taken sufficient to support a 2422(b) conviction.

II. IT WAS ERROR FOR THE TRIAL COURT TO DENY APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THERE WERE NO COMMUNICATIONS TO ESTABLISHED APPELLANT'S INTENT TO ENTICE A FICTITIOUS MINOR, EITHER DIRECTLY OR INDIRECTLY THROUGH AN ADULT INTERMEDIARY, USING A MEANS OF INTERSTATE COMMERCE.

A. Standard of Review

"We review a verdict challenged for sufficiency of the evidence *de novo*, resolving all reasonable inferences in favor of the verdict." *See Yost*, 479 F.3d at 818. "We cannot disturb the verdict unless no trier of fact could have found guilt beyond a reasonable doubt." *Id.* at 818–19.

B. Argument on the Merits

The attempted conduct prohibited by §2422(b) is not an attempt to have sex with a minor. "[M]ere contact for the purposes of engaging in illegal sexual activity is not criminalized in 18 U.S.C. § 2422(b)." *See Root*, 296 F.3d at 1223. "The underlying criminal conduct that Congress expressly proscribed in passing §2422(b)

is the persuasion, inducement, enticement, or coercion of the minor rather than the sexual act itself." *See Murrell*, 368 F.3d at 1286. In *Lee*, the Court held that to prove the requisite intent under 18 U.S.C. §2422(b), "the government must prove the defendant intended to cause assent on the part of the minor, not that he acted with the specific intent to engage in sexual activity." *See Lee*, 603 F.3d at 914; *see also Murrell*, 368 F.3d at 1286; *Bailey*, 228 F.3d at 639 (the intent to entice and the intent to have sex "are two clearly separate and different intents and the Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves."); *United States v. Hughes*, 632 F.3d 956, 961 (6th Cir. 2011) ("[s]ection 2422(b) ... was designed to protect children from the act of solicitation itself - a harm distinct from that proscribed by §2423 [which criminalizes an intent to engage in illicit sex]."

Here, the Government's evidence does not demonstrate the requisite intent under 2422(b). There is no evidence that Mr. Wilkerson sought through his communications to criminally persuade a minor, through an intermediary using a means of interstate commerce. The Government's chief witness, Agent McElyea, testified there was nothing in the context of the emails or statements where Mr. Wilkerson asked to communicate directly or indirectly with the fictitious daughter. *See* Dckt. 139 at 180. In fact, he said, Mr. Wilkerson never indicated an interest in even meeting the fictitious minor. *Id.*

Further, Agent McElyea said Mr. Wilkerson, during the communications, never asked the fake father whether the fictitious daughter had any special interests, made no requests to pass along any messages, never submitted sexually explicit photographs he wanted the adult intermediary to share with the fictitious minor and never engaged in any communication that could be considered grooming behavior. *See* Dckt. 139 at 181-182. Mr. Wilkerson did not make any promises to the fake father or the fictitious daughter, did not offer anything of value in excess of what was asked of him, and did not offer any enhancements or bonuses or anything above and beyond what he was informed would be the cost of receiving oral sex with fictitious daughter. *Id.*, at 114. Mr. Wilkerson did not invite the fictitious minors to go anywhere, offer to pay for a room, a meal, or any other inducement directed at the minor. Furthermore, the fake father never gave Mr. Wilkerson any reason to believe that their communications would be shared with the fictitious daughter or that the fictitious daughter would be consulted about or in any way asked to participate in the discussions.

In sum, in contrast to the vast majority of §2422(b) cases, Mr. Wilkerson did not say or do anything that would necessarily or even logically have resulted in communication from the fake father to the fictitious child. Section 2422(b) unambiguously requires that the offense, or the attempted offense, occur "using ... any facility or means of interstate or foreign commerce." 18 U.S.C. §2422(b); *see*

also United States v. Thomas, 410 F.3d 1235, 1245 (10th Cir. 2005) (required elements are "use of a facility of interstate commerce to knowingly persuade, induce, entice, or coerce" a minor to have sex); *United States v. Douglas* 626 F.3d 161, 164 (2d Cir. 2010); *Murrell*, 368 F.3d at 1286 ("Combining the definition of attempt with the plain language of §2422(b), the government must first prove that Murrell, using the internet, acted with a specific intent to persuade, induce, entice, or coerce a minor to engage in unlawful sex.")

By the same token, the substantial step in the attempt analysis must be a substantial step in enticing a minor using a facility or means of interstate commerce, such as a computer or cell phone. *See United States v. Nestor*, 574 F.3d 159, 160 (3d Cir. 2009) ("The question then becomes whether [the defendant] took a substantial step toward th[e] end [proscribed by §2422(b)], using means of interstate commerce.") A substantial step toward an enticement that does not use means of interstate commerce may constitute an attempt to commit some other crime, but it does not constitute an attempt to violate §2422(b). *Id.*

The requisite intent under §2422(b) is the intent to entice a minor using facilities of interstate commerce, and, as it relates to Count I of the Superseding Indictment, all use of those facilities ceased in this case prior to any such meeting. In light of the statutory requirement that the attempt occur using a facility or means of interstate commerce (and in addition to the other reasons stated above), the

government's apparent theory that Mr. Wilkerson violated §2422(b) by "intending to attempt to entice" the minor at a future physical meeting with the adult intermediary is not tenable.

Thus, because the evidence was insufficient as a matter of law under §2422(b), the trial court erred in denying Mr. Wilkerson's motion for judgment of acquittal. This Court should reverse the convictions and vacate the charges against Mr. Wilkerson.

III. IT WAS ERROR FOR THE TRIAL COURT TO DENY APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THERE WAS NO EVIDENCE APPELLANT TOOK A SUBSTANTIAL STEP TOWARD CAUSING A MINOR'S ASSENT TO ENGAGE IN SEXUAL ACTIVITY USING A MEANS OF INTERSTATE COMMERCE.

A. Standard of Review

"We review a verdict challenged for sufficiency of the evidence *de novo*, resolving all reasonable inferences in favor of the verdict." *See Yost*, 479 F.3d at 818. "We cannot disturb the verdict unless no trier of fact could have found guilt beyond a reasonable doubt." *Id*. at 818–19.

B. Argument on the Merits

The attempted conduct prohibited by §2422(b) is not an attempt to have sex with a minor. "[M]ere contact for the purposes of engaging in illegal sexual activity is not criminalized in 18 U.S.C. § 2422(b)." *See Root*, 296 F.3d at 1223. "The underlying criminal conduct that Congress expressly proscribed in passing §2422(b)

is the persuasion, inducement, enticement, or coercion of the minor rather than the sexual act itself." *See Murrell*, 368 F.3d at 1286. In *Lee*, the Court held the Government must prove "that the defendant took a substantial step towards causing assent not toward causing sexual contact." *See Lee*, 603 F.3d at 914.

Here, the Government's evidence failed to prove Appellant took a substantial step, required under §2422(b), to entice the fictitious daughter through the fake father, using a facility or means of interstate commerce.

The required intent under §2422(b) is not an intent to entice the minor in person at a face-to-fact meeting, but rather to entice, as the statute requires, using a facility or means of interstate commerce. Mr. Wilkerson's travel to Lake Mary for a potential meeting with the fake father also cannot constitute a substantial step. Even assuming arguendo that the substantial step could take place other than by a means expressly designated in §2422(b) ("the mail or any facility or means of interstate or foreign commerce") – which it cannot - Mr. Wilkerson's travel does not qualify under §2422(b). Section 2422(b) criminalizes certain communications between an adult and a minor or between an adult and an adult intermediary that attempts to transform the minor into his victim." *See Hughes*, 632 F.3d at 961.

It is illogical to suggest that physically traveling to an in-person meeting place is a substantial step in a crime that is predicated upon communication by means of interstate or foreign commerce. Physical travel is not a communicative act. *See*

United States v. Goetzke, 494 F.3d 1231, 1237 n.4 ("the crime is persuasion, inducement, enticement, or coercion - not performing a physical act.").

Here, multiple circuits to consider the issue, including this Court, have held that an attempt to violate §2422(b) is completed entirely through the defendant's communications, online and/or with a cell phone. *See Goetzke*, 494 F.3d at 1236; *Thomas*, 410 F.3d at 1245; *Murrell*, 368 F.3d at 1286 ("if a person persuaded a minor to engage in sexual conduct (with himself or a third party), without then actually committing any sex act himself, he would nevertheless violate §2422(b)"); *Bailey*, 228 F.3d at 640 (sufficient evidence of substantial step in enticement offense where defendant sent emails to minor proposing oral sex but did not ever travel to meet girl).

Furthermore, under the law of attempt, the defendant's substantial step must be "necessary to the consummation of the crime." *See United States v. Manley*, 632 F.2d 978, 987-88 (2d Cir. 1980); *see also United States v. Spurlock*, 495 F.3d 1011, 1014 (8th Cir. 2007) (defendant's conversation with purported mother of fictitious daughters "b[ore] the familiar hallmarks of criminal attempt" because, inter alia, "they were necessary to the consummation of the crime"). Appellant's physical travel to Lake Mary was not "necessary to the consummation of an offense" under §2422(b) and therefore cannot constitute a substantial step in the crime under the law of attempt.

Finally, insofar as the government believes that §2422(b) criminalizes an alleged plan by defendant to attempt to entice the fictitious minor at a face-to-face meeting at a future point in time - i.e., once Mr. Wilkerson had been introduced to the fictitious daughter by the fake father - that position reflects a misunderstanding of attempts under §2422(b). The reason defendants in §2422(b) cases involving fictitious minors may be guilty of attempts instead of completed crimes is not because the defendants were planning an enticement but did not yet have the chance to make the required illegal communication. Instead, it is because they attempted the enticement through an illegal communication but was unsuccessful because the minors were not real. *See United States v. Taylor*, 640 F.3d 255, 257 (7th Cir. 2011) ("It's because [the purported minor] was actually an adult that the defendant was charged with and convicted of an attempt rather than a completed crime"); *Yost*, 479 F.3d at 819 ("Yost was convicted of attempt under the statute because no actual minors were involved"); *United States v. Meek*, 366 F.3d 705, 718-19 (9th Cir. 2004) ("the attempt provision here is no different than an attempted solicitation of prostitution where the criminal conduct is the knowing effort to solicit an individual for prostitution. That the individual turns out to be a decoy undercover officer does not vitiate the criminal conduct.").

A plan to attempt something in the future is not an attempt at all; it is a mere preparation. Section 2422(b) and the law of attempt criminalizes "attempt[s]," not

planned future attempts. *See* 18 U.S.C. §2422(b); *Goetzke*, 494 F.3d at 1237 (defendant Goetzke "sent [the minor] letters replete with compliments, efforts to impress, affectionate emotion, sexual advances, and dazzling incentives to return to Montana, and proposed that [the minor] return during the upcoming summer. In short, Goetzke made his move." (emphasis added)).

To be liable under §2422(b), Mr. Wilkerson must already have attempted to induce the fictitious daughter via facilities of interstate commerce, either directly or indirectly through the fake father, before arriving at the face-to-face meeting. Criminal liability under §2422(b) cannot be predicated on an alleged "intent to attempt to entice" at some future time. To constitute a substantial step, a defendant's actions "must cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances." *See Goetzke*, 494 F.3d at 1237 (quoting *United States v. Nelson*, 66 F.3d 1036, 1042 (9th Cir. 1995)). Here, Mr. Wilkerson never took a substantial step toward an attempt to persuade, entice, or induce the fictitious daughter, either in person or through the fake father, via facilities of interstate commerce.

As it relates to Count One (the July, 2014 emails), there was nothing more than discussion of a possible future attempt to meet. No agreement was ever reached and no meeting ever took place. As it relates to Count Two (the October, 2014 emails) while the traveling occurred following the communications, the meeting to

facilitate the introduction of the fictitious daughter did not. Appellant's travel to the meeting place cannot constitute a substantial step, as physically traveling from one location to another is simply not a step in illicitly communicating with a minor, directly or indirectly through an adult intermediary, on the internet, on a cell phone, or through the mail.

Thus, because there is no evidence that Mr. Wilkerson took a substantial step toward attempted enticement of the fictitious daughter using a cell phone, the internet, or the mail, no reasonable jury as a matter of law could find sufficient basis to convict Appellant under §2422(b). The Trial Court erred when it denied Mr. Wilkerson's motion for judgment of acquittal and this Court should reverse the conviction and dismiss the Superseding Indictment.

IV. WHERE APPELLANT'S COMMUNICATIONS SOLELY WITH AN ADULT INTERMEDIARY ARE NOT ILLEGAL UNDER FLA. STAT. 800.04, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS AS A MATTER OF LAW.

A. Standard of Review

The Court reviews the denial of a motion to dismiss an indictment for abuse of discretion. *See* *United States v. Evans*, 476 F.3d 1176, 1178 (11th Cir. 2007). "[W]hen employing an abuse-of-discretion standard, we must affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong

legal standard." *See United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (citing *Maiz v. Virani*, 253 F.3d 641, 662 (11th Cir. 2001)).

B. Argument on the Merits

Trial Counsel argued the Government's evidence failed to establish there was "a knowing attempt to persuade, induce, or entice someone Appellant believed to be a minor to engage in sexual activity which could be charged as a criminal offense in the State of Florida." *See* Dckt. 139 at 212. In particular, the Government alleged in its Superseding Indictment the underlying state law predicate generally was Fla. Stat. 800.04, which criminalizes sexual activity with a minor.

Trial Counsel argued there was no testimony about what the crime in Florida would be if, in fact, it had been committed, no testimony about any statutory basis, and "no description of any kind from any witness before the court that would suggest that we have established for the jury's consideration that had this charade been allowed to continue forward and had a potential meeting actually occurred, that somehow a violation of Florida Statute would have thereby been perpetrated." *See* Dckt. 139 at 213.

The Government argued that had Appellant received oral sex from a minor it would have been unlawful under Fla. Stat. 800.04.[3] *See* Dckt. 139 at 219. The

[3] A person commits lewd or lascivious battery by engaging in sexual activity with a person 12 years of age or older but less than 16 years of age. *See* Fla. Stat. 800.04(a)(1). "Sexual activity" means the oral, anal, or vaginal penetration by, or

Government admitted there was no evidence in the record concerning the underlying state law predicate but suggested the Trial Court should instruct the jury as a matter of law that receiving oral sex from a minor, assuming the meeting took place and assuming Mr. Wilkerson followed through receiving oral sex from the fictitious daughter, was a violation of Florida law because oral sex is considered "sexual activity" under Florida law.[4] *Id.*, at 221.

However, this was incorrect as a matter of law because soliciting an adult to commit lewd or lascivious conduct is not illegal under Fla. Stat. 800.04. It is a crime only if the defendant actually committed, versus attempted to commit, lewd or lascivious conduct. Under Fla. Stat. 800.04, the age of the person actually solicited is an element of the offense and therefore it is only a crime if there is actually a person under sixteen years old that is actually solicited. *See Pamblanco v. State*, 111 So.3d 249, 252 (Fla. 5th DCA 2013); *see also* Fla. Std. Jury Instr. (Crim.) 11.10(d).

"To commit lewd or lascivious conduct, it seems clear the request must be made to someone under sixteen. It is not enough a defendant believes the victim is under sixteen." *See Pamblanco*, 111 So.3d at 252.

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union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however sexual activity does not include an act done for a bona fide medical purpose. *See* Fla Stat. 800.04 (1)(a).

[4] The Government argued its agents could not testify to this fact because it called for a legal conclusion which is improper for a lay witness. *See* Dckt. 139 at 222.

Florida law specifically addresses situations where the defendant, to be found guilty, simply must believe the person being solicited is under sixteen. *See, e.g.*, Fla. Stat. 847.0135 (making it an offense to travel to meet a child or a person believed to be a child for the illicit purposes outlined in the statute). The Government chose to identify Fla. Stat. 800.04 as its underlying predicate and there was no evidence Mr. Wilkerson violated that statute. It was, therefore, an error of law to deny Appellant's motion to dismiss on this ground.

V. THE TRIAL COURT ERRED BY APPLYING A TWO-LEVEL MULTI-COUNT ENHANCEMENT AT SENTENCING WHERE THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION ON COUNT ONE, AND APPLYING A FIVE-LEVEL SENTENCING ENHANCEMENT UNDER U.S.S.G. §4B1.5(B) WHERE THERE WAS NO EVIDENCE THAT APPELLANT "ENGAGED IN A PATTERN OF ACTIVITY INVOLVING PROHIBITED SEXUAL CONDUCT."

A. Standard of Review

"We review purely legal questions involving the Sentencing Guidelines issues *de novo*, factual findings for clear error, and the district court's application of the Guidelines to the facts with due deference. *See United States. v. Syed*, 616 Fed. Appx. 973, 982 (11th Cir. 2015) (citing *United States v. Rothenberg*, 610 F.3d 621, 627 (11th Cir. 2010)). The interpretation of a statute is a question of law subject to *de novo* review. *See United States v. Pistone*, 177 F.3d 957, 958 (11th Cir. 1999).

B. Argument on the Merits

"A district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *See Peugh v. United States*, 133 S.Ct. 2072, 2080 (2013) (citing *Gall v. United States,* 552 U.S. 38, 49 (2007)). Failure to calculate the correct Guidelines range renders a sentence procedural defective. See *Gall,* 552 U.S. at 51.

Here, Appellant's sentence was enhanced incorrectly two levels based upon a multiple counts (2), and five levels based upon a "pattern of activity" pursuant to USSG §4B1.5. In both instances, the Trial Court abused its discretion in overruling Appellant's objection at sentencing to these enhancements.

The Government conceded there was no "victim" and the Government's chief witness at trial testified he was posing as the same fake father trying to pimp out his fictitious daughter when he posted both solicitations on Craigslist. There was no evidence these were separate minors. Further, as noted above as it relates to Count One of the Superseding Indictment, there was insufficient evidence to sustain a conviction. Absent sufficient evidence, the multi-count enhancement is inapplicable.

The Trial Court also erred in imposing a five-level enhancement on the grounds that Appellant engaged in a pattern of activity involving prohibited sexual

conduct. This enhancement is identified in U.S.S.G. §4B1.5(b)(1) and provides for an enhancement "[i]n any case in which the defendant's instant offense of conviction is a covered sex crime ... and the defendant engaged in a pattern of activity involving prohibited sexual conduct." *See United States v. Carter*, 292 Fed. Appx. 16, 20 (11th Cir. 2008). However, the attempted enticement offense for which Appellant was convicted is not a covered offense under that guideline section.

A "pattern of activity involving prohibited sexual conduct" exists if, on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor. *See United States v. Castleberry*, 594 Fed. Appx. 612, 613 (11th Cir. 2015). *Castleberry* references specifically Comment Note 4(B)(i) under USSG § 4B1.5. The Supreme Court has made clear that "commentary in the [Sentencing] Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *See United States v. Hall*, 714 F.3d 1270, 1272-73 (11th Cir. 2013) (citing *Stinson v. United States*, 508 U.S. 36 (1993) (reversing the Eleventh Circuit's previous holding that such commentary was not binding on federal courts); *see United States v. Beckles*, 565 F.3d 832, 842 n.1 (11th Cir. 2009).

Specifically, Comment Note 4 defines "prohibited sexual conduct" as including "any offense described in 18 U.S.C. §2426(b)(1)(A). This particular section of the code defines the sex offenses applicable to include those under chapter

109A, chapter 110, or section 1591. To be applicable, the Government had to demonstrate Appellant engaged in prohibited sexual conduct with a minor on at least two separate occasions.

First, Chapter 117 offenses, of which Appellant was convicted, are not listed as applicable sex offenses. Second, as noted above, there was insufficient evidence to sustain a conviction as to Count One of the Superseding Indictment and therefore there is no "pattern of activity" that includes prohibited conduct on at least two different occasions. Based upon the clear statutory language, it was error for the Trial Court to impose this enhancement.

The Government argued the enhancement applied because Appellant was convicted of two counts of enticing a minor to engage in prostitution. *See* Dckt. 141 at pg. 20. This is a flatly incorrect statement of the conviction and the Government conceded the commercial sex act enhancement, which Probation wanted, did not apply. *Id.*, at pg. 18. Despite this, the Government then argued Appellant was convicted of a qualifying Section 1591 offense, which is factually wrong.

> "According to the guidelines -- and we're looking at United States Sentencing Guideline Commentary note 4(A)(i) for purposes of subsection B, prohibited sexual conduct, means any of the following: Any offense described in Title 18, United States Code, Section 2426(b)(1)(A) or (B). Title 18, Section 2426(b)(1), includes any offense under Chapter 109A, 110, or Section 1591. In this case, his attempt to engage a minor in prostitution is conduct that falls squarely under 1591, commercial sex trafficking of a minor. If the offense of conviction qualifies as prohibited sexual conduct, the pattern of activity

> enhancement is available if the district court finds only one additional occasion of prohibited sexual conduct."

See Dckt. 141 at 22.

The Government repeatedly misstated to the Trial Court the conviction involved prohibited sexual conduct under U.S.S.G. 4B1.5, specifically, "the offense conduct involves commercial sex trafficking of a minor." Appellant argued the Government was trying to use the "prostitution issue" to meet the §4B1.5 application and that its application was wrong as a matter of law because Appellant was never convicted of a 1591 offense. *See* Dckt. 141 at pg. 24-25.

The Trial Court incorrectly applied the enhancement based upon a misapprehension of its language. The Trial Court stated because there were two separate attempt convictions, with "two separate notional minors," the enhancement applies. *See* Dckt. 141 at pg. 7. This misstates how the enhancement is applied and under what circumstances it is applied. First, factually, the Trial Court erred in finding there was sufficient evidence of "two separate notional minors." Second the enhancement is not applicable to a Chapter 117 offense conviction.

The Trial Court, however, fails to recognize the correct application of the 4B1.5 enhancement.

> "But as I look at 4B1.5 and the comments, the comment for application of the subsection notes that for purposes of subsection B, the defendant engaged in a pattern of activity involving prohibited sexual conduct, if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor. The offense with

> which the defendant was charged and for which he was convicted involved prohibited sexual conduct of a minor.

See Dckt. 141 at pg. 25-26.

The Trial Court then identified that the case had nothing to do with prostitution or "anything related to prostitution." The Trial Court suggested, "this argument that both (Appellant) and the Government are going off chasing this rabbit down the prostitution rabbit hole has no relevance to the application of this particular enhancement." *See* Dckt. 141 at pg. 28. This statement demonstrates the Trial Court's clear misapprehension of the guideline commentary. The Trial Court continued. "But if, in fact, it is two separate offenses involving a notional minor in July or June as well as another one later in the year in October, then that qualifies as a pattern of activity under the enhancement if those facts are true." *Id.*

The Trial Court overruled Appellant's objection noting it was applying the enhancement based upon "the Court's interpretation that the pattern of activity relates to the prohibited sexual conduct of a minor, the two separate enticement convictions and not on the basis of a commercial sex act." *See* Dckt. 141 at pg. 31. The problem, however, is that the proof was insufficient to sustain a conviction as to Count One of the Superseding Indictment, which is one of the instances the Trial Court relied upon, and further, Appellant's convictions are not covered offenses that would permit the 4B1.5 enhancement.

Failure to calculate the correct Guidelines range renders a sentence procedural defective. *See Gall,* 552 U.S. at 51. It was error for the Trial Court to impose the enhancement and this Court should vacate the sentence and remand this matter for a re-sentencing.

CONCLUSION

Based upon the foregoing, the judgment and conviction of the District Court should be vacated, the matter remanded for entry of judgment of acquittal in Appellant's favor, or, in the alternative, for re-sentencing; and for such other and further relief as this Honorable Court shall deem just, fair, and equitable.

Dated: April 18, 2016

Respectfully Submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c), the undersigned certifies that this brief complies with the type-volume limitations of said rule. Exclusive of the exempted portions in said rule, the brief, which was prepared using Microsoft Word, contains 11,572 words.

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was filed electronically on April 18, 2016, and that a copy was made upon opposing counsel through the Court's CM/ECF system.

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